Supreme Court, U.S.
FILED
JUN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1769

In The

Supreme Court of the United States

October Term, 1988

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

Petitioner,

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Vermont

BRIEF OF APPELLEE VILLAGE OF STOWE IN OPPOSITION TO THE PETITION OF MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

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June 7, 1989

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QUESTIONS PRESENTED

1. Should Massachusetts Municipal Wholesale Electric Company, the Petitioner in this case, be permitted to raise federal constitutional claims against the Village of Stowe before this Court when those claims were not raised before the State of Vermont trial court?

2. Did the Vermont Supreme Court deny any due process rights of the Petitioner when it determined that the Power Sales Agreements between Massachusetts Municipal Wholesale Electric Company and the Vermont participant municipalities were void *ab initio* under the pre-existing statutory and common law of the State of Vermont?

3. Did the Vermont Supreme Court discriminate against the Petitioner's rights under the Commerce Clause when it applied the neutral statutory and common law of the State of Vermont to find that the Power Sales Agreements between Massachusetts Municipal Wholesale Electric Company and the Vermont municipalities were void *ab initio*?

4. Should a Writ of Certiorari be granted in this case when the Supreme Court has previously refused to grant Certiorari in cases involving identical issues decided by the State of Washington Supreme Court?

PARTIES TO THIS PROCEEDING

The Petition for Certiorari describes the parties to this proceeding. This Brief in Opposition to the Petition for Certiorari is being filed on behalf of the Village of Stowe, one of the Respondents.

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STATEMENT OF THE CASE

The Petitioner has presented a Statement of the Case setting forth the general background of this action. The Village of Stowe finds it necessary, however, to bring some corrections and additions to the Court's attention.

MMWEC does not clearly identify the precise involvement of the Village of Stowe in this case. Stowe did not execute a Power Sales Agreement directly with MMWEC. Instead, it entered into a Power Sales Contract with the Village of Morrisville, through which it assumed responsibility for all of Morrisville's obligations in connection with a portion of the project capability purchased by Morrisville from MMWEC. Since the Power Sales Contract fully incorporated the terms of the Power Sales Agreement, Stowe became indirectly responsible for payments to MMWEC. Morrisville forwarded all of Stowe's payments for Seabrook project capability directly to MMWEC.

The Petitioner has made certain general statements concerning the widespread reliance by utilities upon so-called "take-or-pay" contracts. (Petition for Certiorari, pp. 6,8). There is an implication that take or pay contracts generally impose obligations which are identical to those contained in MMWEC's Power Sales Agreements. It is the position of the Village of Stowe that contracts containing provisions such as those set out in the Agreements at issue here are very rare in the State of Vermont. In any event, this issue was never dealt with on an evidentiary level in the Vermont Courts. The trial court decided the case on the basis of a legal question: whether the Power Sales Agreements were void as a matter of law. Certain

other contracts had been pleaded in the case, but there was never an analysis of those contracts or a comparison of their terms with those of the Power Sales Agreements. The Supreme Court of Vermont properly pointed out that neither the defendants' concern about the existence of identical contracts nor the plaintiffs' emphasis on the immensity of financial burden imposed by the agreements were proper considerations in connection with that Court's decision. (Petition for Certiorari, Appendix A, pp. 22A 23A).

In its Statement, MMWEC has also asserted that the Power Sales Agreements do not grant MMWEC a security interest in any funds or property of the participants (Petition for Certiorari, p. 7). In the courts below, the Respondents asserted that the Power Sales Agreements did indeed create a security interest. This issue never had to be reached by the Vermont Supreme Court (Petition for Certiorari, Appendix A, p. 22A). This Court should not be misled by an assertion that there was no security interest created, when the matter was never resolved by the state courts.

MMWEC mistakenly claims that the Vermont Public Service Board undertook an "approval of the PSAs" (Petition for Certiorari, p. 9). The General Order No. 45 process involves a filing so that the Vermont Public Service Board has an opportunity to review proposed contracts, not any necessary approval process. The evidence in this case demonstrated that the Agreements were filed with the Board by Stowe and other Vermont municipal participants in accordance with General Order No. 45. There was, however, no order approving the Village of Stowe's involvement in the obligations created by the Power Sales

Agreements, as they were incorporated into the contract between Stowe and the Village of Morrisville.

In describing the present litigation, MMWEC neglects to point out that the Village of Stowe moved for, and obtained, intervention as a plaintiff in this case below. As part of its Motion for Intervention, Stowe served a Complaint against MMWEC. Since MMWEC never responded to this Complaint, it did not raise its federal affirmative defenses against the Village of Stowe.

SUMMARY OF ARGUMENT

The Village of Stowe opposes the request made by Massachusetts Municipal Wholesale Electric Company for a Writ of Certiorari to the Supreme Court of Vermont to determine whether that Court unconstitutionally foreclosed the presentation of MMWEC's affirmative federal law defenses in the State proceedings below.

The Village of Stowe's initial objection is based upon a procedural ground. Although MMWEC vigorously defended the action below, at no time did it specifically file an answer to the Complaint of the Village of Stowe in this case. The affirmative defenses upon which it relies were therefore never properly raised against the Village of Stowe. This Court has no procedural basis to undertake a review of the federal constitutional issues raised by MMWEC.

MMWEC's substantive argument relies upon the Due Process Clause and the Interstate Commerce Clause of the United States Constitution. There could have been no

violation of the Due Process Clause, as asserted, because MMWEC never owned any recognizable property interest. The Vermont Supreme Court determined that the Power Sales Agreements were void *ab initio* under a clear interpretation of Vermont statutory law enacted prior to execution of the Agreements. MMWEC never possessed any reasonable investment-backed expectations.

There was furthermore no violation of the Commerce Clause. A nondiscriminatory Vermont statute was in effect prior to execution of the MMWEC Power Sales Agreements. MMWEC gained no contractual rights because the Agreements were in violation of the existing statute. It cannot now claim discrimination under the Commerce Clause in an effort to circumvent its obligations under state law.

ARGUMENT

I. MMWEC'S FAILURE TO RAISE FEDERAL AFFIRMATIVE DEFENSES AGAINST THE VILLAGE OF STOWE IN THE PROCEEDINGS BELOW PRECLUDES ITS ABILITY TO RAISE THOSE DEFENSES BEFORE THIS COURT.

In its Petition for Certiorari, MMWEC refers to the Village of Stowe as "an intervenor". (Petition for Certiorari, P. iii) This reference makes it clear that MMWEC has an understanding of the nature of Stowe's involvement in this case. The Vermont Rules of Civil Procedure provide for a right of intervention upon filing of an application to intervene and a pleading setting for the claim or defense for which intervention is sought. V.R.C.P. 24. The Motion to Intervene must be served upon

the other parties in the case in accordance with V.R.C.P. 5. Rule 5 requires service of all documents in an action upon the other parties by mail or personal delivery.

The docket sheet of the Washington Superior Court in this case, attached as Exhibit A to this Brief, indicates that the Village of Stowe filed a Motion to Intervene in the action on October 28, 1985. A copy of the motion filed is attached hereto as Exhibit B. The Village of Stowe included a copy of its Complaint with the Motion to Intervene. The Washington Superior Court issued an Order permitting intervention on November 18, 1985. This Order was served upon all parties to this action.

Neither the docket sheets of the Washington Superior Court nor the actual court files contain any evidence that MMWEC ever filed an answer to the Complaint brought by the Village of Stowe. MMWEC's Answer, relevant portions of which have been attached as Appendix E to its Petition for Certiorari, was filed in response to the Complaint of the Vermont Department of Public Service only.

V.R.C.P. 12(b) mandates that a responsive pleading shall assert every defense, in law or fact, to a claim for relief brought by the opposing party. Defenses which are not raised in a responsive pleading are waived. *In re Stocker*, 133 Vt. 161, 163 (1975).

MMWEC has no grounds to raise its federal constitutional defenses against the Village of Stowe before this Court, since those defenses have long since been waived by MMWEC's failure to answer Stowe's Complaint in the context of the lower court proceedings.

II. INVALIDATION OF THE POWER SALES AGREEMENTS DID NOT DEPRIVE MMWEC OF ANY PROPERTY INTEREST IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Village of Stowe's obligation to pay a portion of the MMWEC "project capability", purchased through the Power Sales Agreement between the Village of Morrisville and MMWEC, was invalidated by the Vermont Supreme Court on the basis of the language contained in 30 V.S.A. §4002. This statutory provision authorized Stowe to undertake the purchase capacity and energy, but not to enter into the unconditional long-term obligations associated with "project capability." (Petition for Certiorari, Appendix A, p. 7a.) Due to the fact that there were other statutory sections applicable to some of the Vermont utilities, the Vermont Supreme Court also concluded that the Power Sales Agreements involved an impermissible delegation of power. Since there were no other statutory provisions applicable to the Village of Stowe, the decision on Section 4002 fully disposed of Stowe's claims.

Both the provisions of 30 V.S.A. §4002 and the delegation doctrine existed prior to execution of the Power Sales Agreements in 1979. In order to demonstrate a deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment, MMWEC must show that there has been an "interference with reasonable investment-backed expectations." *Prune Yard Shopping Center v. Robbins*, 447 U.S. 74, 83 (1980). In order to have investment-backed expectations of any sort under the Due Process Clause, the party asserting a violation of Due Process

must, in the first instance, have an established property interest.

In the *Prune Yard* case, cited by MMWEC in support of its Petition, the Due Process question arose from a prohibition against the dissemination of political literature in a shopping center. There was no dispute in that case about the existence of a basic property interest in the owner of the shopping center. The question, instead, involved a secondary inquiry: whether the State court's declaration of a right to disseminate literature in a shopping center involved a "taking" of a property interest under the United States Constitution.

The secondary inquiry is not even reached in the instant case, since the Petitioner never possessed the basic initial property interest. Under the established law of the State of Vermont at the time when the Power Sales Agreements were entered into, there was no authority by the Vermont participants to execute or carry out the terms of the Agreements. MMWEC never received a property interest which could later be "taken" or otherwise affected by government action.

In the case of *Armstrong v. United States*, 364 U.S. 40 (1960), also relied upon by MMWEC, the necessary prerequisite property interest not present in this case was specifically recognized by the Supreme Court: ". . . Petitioners had valid liens under Maine law against both the hulls and whatever unused materials which Petitioners had furnished," *Id.* at 46. The *Armstrong* Court concluded that the property interest established under state law had been wrongfully taken by the United States

Government without compensation. *Id.* at 48-9. If the property interest had not existed, the case holding would have been necessarily different.

MMWEC's reliance in this case upon *Webb's Fabulous Pharmacy, Inc. v. Beckwith*, 449 U.S. 155 (1980), is similarly ill-founded. The Court in *Webb's* clearly accepted the Florida Supreme Court reading of the statute, stating that that reading was "within the Florida Court's competency, and we must take the statute as so read and interpreted," *Id.* at 160. In fact, the *Webb's* case analysis precedent squarely mandates denial of the Petition for Certiorari requested in this matter.

In the case of *Home Building & Loan Association v. Blaisdale*, 290 U.S. 398, 448 (1934), the Court pointed out that a state:

> continues to possess authority to safeguard the vital interest of its people. . . . This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

Rather than offering "remarkably little Vermont precedent for its reasoning," as the Petitioners in this case allege (Petition for Certiorari, p. 16), the Vermont Supreme Court has cited a clear statute and a legal doctrine in existence at the time when the Power Sales Agreements were executed. This Court should accept the Vermont Supreme Court's conclusion and deny the requested Petition for Certiorari.

III. INVALIDATION OF THE POWER SALES AGREEMENTS DOES NOT BURDEN OR DISCRIMINATE AGAINST MMWEC'S ACTIVITIES IN INTERSTATE COMMERCE.

In order to analyze MMWEC's claim that invalidation of the Power Sales Agreements discriminated against MMWEC's activities in interstate commerce, it is necessary to review the provisions of the statute relied upon by the Vermont Supreme Court to invalidate the Village of Stowe's obligation to pay for Seabrook project capability. 30 V.S.A. §4002 provides, in relevant part, as follows:

> Any cooperative or municipal electric utility shall have:
>
> . . . .
>
> (2) authority to act in participation with other such utilities in arranging for the purchase of supplies of capacity and energy from other utilities, either within or without the State of Vermont, including purchases from private electric utilities, municipal electric utilities, cooperatives, associations of utilities, or public authorities. . . .

In its opinion, the Vermont Supreme Court stated that "supplies of capacity and energy" were not equivalent to the vastly open-ended concept of "project capability" (Petition for Certiorari, Appendix A, P. 7a).

The Commerce Clause protects persons against discriminatory state regulation. The applicable standard for review of a state statute is set out in the case of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where a statute regulates even-handedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is

clearly excessive in relation to the putative local benefits.

There is no economic protectionism of any sort embodied in the terms of 30 V.S.A. §4002(2). It would be difficult to find a more even-handed statute. Vermont utilities have the right to arrange for the purchase of supplies of capacity and energy from any utilities, whether or not those utilities are located in the State of Vermont. The class of utilities is expansive, including private electric utilities, municipal electric utilities, cooperatives and others.

The invalidity of the Power Sales Agreements arises from the limits which Section 4002 places on the authority of all utilities, both those within and outside Vermont. There is no precedent for compelling a state to expand the scope of its statutory provisions to permit special benefits for a utility which happens to be located outside the state. The limitations of Section 4002 apply to all utilities, wherever they are located. There is no discrimination against interstate commerce. Section 4002 can fairly be viewed as a law directed to legitimate local concerns. with effects upon interstate commerce that are only incidental. *Pike*, at 142.; *See also Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Recognizing the basic weakness of its Commerce Clause claim, MMWEC has attempted to obscure the issue by attacking the validity of the Vermont Supreme Court decision which interpreted the statute. MMWEC is well aware, as footnote 5 of its argument shows, that there is no precedent for overturning a state court's reasonable interpretation of state statutory or common law. As the Supreme Court stated in *Great Northern Railway*

Company v. Sunburst Oil & Refining Company, 287 U.S. 358, 365 (1932):

> The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their action.

The courts of the state have the supreme authority to interpret and declare the written and unwritten laws of the state, and the Supreme Court has long respected that right. *Brinkerhoff-Faris Company v. Hill*, 281 U.S. 673, 680 (1930).

The case of *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), relied upon by MMWEC, involved an existing statute which gave the residents of New Hampshire a preferred right of access, over out-of-state consumers, to natural resources located within the state boundaries. The Supreme Court overturned an order of the state commission, based upon the statute, which gave priority to state consumers over others. *New England Power Co.* obviously has no applicability to the present action, where the statute of the Vermont statute was neutral in its face and has been applied neutrally to all parties. The result would have been the same if MMWEC had been a Vermont, rather than Massachusetts, utility company. In fact, the Vermont participants who argued in favor of the Power Sales Agreements faired no better than MMWEC before the Vermont Supreme Court. They were also released from their obligations under the terms of the Power Sales Agreements.

MMWEC places great reliance upon the case of *Middle S. Energy, Inc. v. Arkansas Public Service Commission*,

772 F2d 404 (8th Cir. 1985), where the Eighth Circuit Court of Appeals upheld an injunction prohibiting the Arkansas Public Service Commission from invalidating contracts under which an Arkansas utility company sought to purchase project capability from an out-of-state power facility. The *Middle S.* case is clearly distinguishable from the present action, because the Arkansas court system had not considered the validity of the contracts. The Court of Appeals upheld an injunction against the Public Service Commission's vigorous advocacy efforts to nullify the obligations of Arkansas Power & Light Company under the contract.

In the course of its decision, the *Middle S.* Court recognized its understanding that the state courts of Arkansas could have properly ruled upon the validity of the contract. *Id.* at 413. An obvious corollary of this understanding is a recognition that the Arkansas courts' interpretation of state law questions would have been respected by the Court of Appeals. The Court of Appeals even considered the option of deferring to the state courts in connection with the issue of contract interpretation. It did not do so only because of the anticipated substantial delay and expense which would have been involved if such a deferral had been permitted. *Id.* at 413. One can only conclude from the *Middle S.* case that if the Arkansas courts had taken an action similar to that taken by the Vermont Supreme Court, the decision of the state court would have been fully respected by the federal court system.

The decision of the Vermont Supreme Court in this case does not involve discriminatory, protectionist action.

The State of Vermont's statute was interpreted in a manner which makes it even-handedly applicable to both in-state and out-of-state utilities. MMWEC is seeking to have this court grant it special rights because it happens to be a utility company located outside the State of Vermont. This sort of discrimination cannot be permitted under the guise of asserting rights under the Commerce Clause.

IV. A WRIT OF CERTIORARI SHOULD BE DENIED IN THIS CASE BECAUSE THE SUPREME COURT HAS ALREADY REFUSED TO GRANT CERTIORARI IN CASES FROM THE STATE OF WASHINGTON RAISING IDENTICAL ISSUES.

This case does not raise issues of first impression before this Court. Two prior cases dealt with the legality of power sales agreements, almost identical to those involved in this case, entered into by municipalities in connection with a nuclear power project owned by Washington Public Power Supply System. *Chemical Bank v. Washington Public Power Supply System*, 99 Wash. 2d 772, 666 P.2d 329 (1983) *(Chemical Bank I); Chemical Bank v. Washington Public Power Supply System*, 102 Wash. 2d 874, 691 P.2d 524 (1984) *(Chemical Bank II)*. The Washington Supreme Court had ruled that the agreements at issue in those cases were void under state doctrines of statutory authority and delegation of authority identical to those applied by the Vermont Supreme Court. The parties who did not prevail before the Washington Supreme Court applied to this Court for a Writ of Certiorari. This Court denied the request without comment. 471 U.S. 1075 (1985)

(Chemical Bank I); 471 U.S. 1065 (1985) *(Chemical Bank II).* In light of this precedent, there is no reason why the Court should grant Certiorari in this case.

V. CONCLUSION.

On the basis of the arguments which it has set forth in this Brief, the Village of Stowe asks this Court to deny the request of Massachusetts Municipal Wholesale Electric Company for a Writ of Certiorari to the Supreme Court of Vermont.

Respectfully submitted,

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APPENDIX

EXHIBIT A

Vol 114 P 66

STOWE, Village of – Intervenor-----Edward B. French, Jr.
P.O. Box 1016
Stowe, VT. 05672-1016

S-412-85 Wnc

VT. DEPT. OF PUBLIC SERVICE-----Michael Marks
Dinah Yessne
(Asst. Attys. Gen., 120 State Str.,
Montpelier, VT. 05602)

v.

MASSACHUSETTS MUNICIPAL WHOLESALE
ELECTRIC CO.----John Parker
– Out-of-state – Gerald J. Caruso

LUDLOW, Village of ..... Stephen C. Walke, Jr.
..... Ralph W. Howe, III
LYNDONVILLE, Village of....."
MORRISVILLE, Village of ....."
..... " William Piper
..... " Robert Mello
NORTHFIELD, Village of..... Peter J. Monte
..... Ralph W. Howe
VT. ELECTRIC
COOPERATIVE, INC. ..... Michael L. Burak
(95 St. Paul St., Burlington 05402)

WASHINGTON ELECTRIC
COOPERATIVE, INC. ..... Stephen C. Walke, Jr.
..... Ralph W. Howe, III

(Dec. & Injunctive Relief – Power Project)

1985

October 18

Complaint for Declaratory & Injunctive Relief dtd 10/18/85, First Set of Dept. of Public Service Requests to Admit Served on MA. Municipal Wholesale Electric Co., First Set of Dept. of Public Service Interr. & Requests to Produce to MA. Municipal Wholesale Electric Co., First Set of Dept. of Public Service Requests to Admit served on the Village of Ludlow, Lyndonville, Morrisville & Northfield & on the Vt. Electric Coop., Inc. & on the Washington Electric Coop., Inc. filed; Original Summons returned for signatures;

October 24

Summons filed by Special Asst. Atty. Gen. Dinah Yessne;

October 28

Mo. to Intervene, Memorandum of Law, Complaint for Declaratory & Injunctive Relief filed by Atty. French;

November 12

Mo. to Extend Time to Answer & Affidavit in Support of Mo. to Extend Time filed by Atty. Burak;

File given to Judge Morse for consideration on Mo. to Intervene and Mo. to Extend Time to Answer;

Notice of Appearance, Counterclaim Against the Vt. Dept. of Public Service & Answer to Counts I Through IX of the Complaint of the Vt. Dept. of Public Service of the Village of Ludlow, Village of Lyndonville, Village of Morrisville & Washington Electric Coop., Inc. with Exhibits A-W; Mo. of Ludlow, Lyndonville, Morrisville & WEC to Dismiss

Counts X through XIV of Pltf's Complaint & Memorandum in Support Thereof, Mo. of Ludlow, Lyndonville, Morrisville & Washington Electric Coop., Inc. for an Extension of Time Within Which to Answer Pltf's First Set of Interr., Requests to Produce & Requests to Admit with Incorporated Memorandum of Law; Mo. for Pre-Trial Conference, Deft Villages Ludlow, Lyndonville & Morrisville & WEC's First Request to Produce to DPS; Copy of letter to counsel re: proposed Stipulation for Discovery Schedule all filed by Attys. Walke & Howe;

COUNTERCLAIM

Vol 114 P 66

STOWE, Village of – Intervenor-----Edward B. French
P.O. Box 1016
Stowe, VT. 05672

S-412-85 Wnc

VT. DEPT. OF PUBLIC SERVICE-----Michael Marks/
Dinah Yessne
(Asst. Attys. Gen., 120 State St
Montpelier, VT. 05602)

v.

Ferriter & Barna, P.C., One Milk St., Boston, MA 02109

MASSACHUSETTS MUNICIPAL WHOLESALE
ELECTRIC CO.----John Parker
– Out-of-state – Gerald J. Caruso

LUDLOW, Village of ..... Stephen C. Walke, Jr.
..... Ralph W. Howe, III
LYNDONVILLE, Village of....."
MORRISVILLE, Village of ....."
.... " William B. Piper
.... " Robert A. Mello
NORTHFIELD, Village of..... Peter J. Monte

VT. ELECTRIC
COOPERATIVE, INC. ..... Michael L. Burak
(95 St. Paul St., Burlington 05401)

WASHINGTON ELECTRIC
COOPERATIVE, INC. ..... Stephen C. Walke, Jr.
..... Ralph W. Howe, III
..... Mary P. Kehoe

(Dec. & Injunctive
Relief – Power Project)

1985
November 27

Memorandum of Dept. of Public Service in Opposition to Mo. of Villages of Ludlow, Lyndonville & Morrisville & Washington Electric Cooperative, Inc. to Dismiss Counts X-XIV of its Complaint filed by Attys. Marks & Yessne;

December 2

Mo. of Vt. Electric Cooperative, Inc. for an Extension of Time Within Which to Respond to Pltf's First Set of Interrogatories, Requests to Produce and Requests to Admit, Mo. to Extend Time to Answer & Affidavit in Support of Motion to Extend Time to Answer filed by Atty. Burak;

Hearing on Motion for Extensions of Time-granted to 1/6/86; All motions ready for hearing set for 12/20/85 at 9:00 A.M. Morse, Jensen, Woodward, Judges;

December 3

Mo. of Defts Villages of Ludlow, Lyndonville & Morrisville & Washington Electric Cooperative, Inc. for Extension of Time Within Which to Respond to Dept. of Public Service's Mo. for Summary Judgment & Memorandum of Law in Support of Motion; Mo. of

(Dec. & Injunctive
Relief – Power Project)

1985
December 3

Defts Villages and WEC to Compel & Memorandum of Law in Support of Motion; & Mo. of Defts Villages & WEC for an Order Designating this Case as a Complex Action with Incorporated Memorandum of Law filed by Attys. Walke, Howe & Kehoe;

Letter to Judge Morse from Atty. Howe filed re: Motions;

December 4

Mo. of Villages of Ludlow, Lyndonville, Morrisville, & Washington Electric Cooperative, Inc. for Protective Order Re: First Set of Dept. of Public Services Interrogatories & Requests to Produce filed by Attys. Walke, Howe & Kehoe; (with exhibits)

December 5

Defts Villages of Ludlow, Lyndonville & Morrisville & Washington Electric Cooperative, Inc.'s Second Request to Produce and First Interrogatories to the Dept. of Public Service with Exhibits and Defts. Villages and WEC's First Requests for Admission to the Dept. of Public Service filed by Attys. Walke, Howe & Kehoe;

COUNTERCLAIM Vol 114 P 66

COMPLEX ACTION – S-412-85 Wnc
JUDGE MORSE ASSIGNED
VT. DEPT. OF PUBLIC SERVICE

vs

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO. et al.

(Dec. and Inj. Relief –
Power Project)
(SEE COVER PAGE FOR LIST OF APPEARANCES)

1985
December 20

Hearing on pending motions; Morse, Jensen, Woodward, Judges Mitchell Reisner, Reporter;
Northfield to Dismiss 11/12/85, withdrawn; Counsel for Northfield agreed to accept service;
Northfield to Strike 11/22/85 – Denied;
LLMW to Dismiss 11/12/85 – Under advisement;
LLMW for Discovery Conf – granted;
DPS to Dismiss Counterclaim 11/20/85 – under advisement
DPS to Srike 11/20/85 – Under advisement
DPS for Summary Judgment 11/20/85 – Hearing set for 1/17/86 at 1:00 P.M.
DPS for Expedited Consideration 11/20/85 – Granted;
LLMW for Designation as Complex 12/3/85 – Granted;
LLMW to Compel 12/3/85 – withdrawn;
LLMW to Extend 12/3/85 – Granted to 1/15/86;
LLMW Protective Order 12/4/85 – withdrawn;
VEC to Extend Time 12/13/85 – Granted to 12/20/85
MMWEL to Dismiss – set for hearing 1/17/86 at 1:00 P.M. Memo due by 1/15/86;
DPS to Compel 12/18/85 – withdrawn;
Morrisville for Pre. Inj. set for 1/2/86 at 9:30 A.M.
Transcript order of hearing on pending motions for 12/20/85 filed by Atty. Opel; Copy of request hand-given to Reporter Reisner;
Notice of Hearing for 1/2/86 hearing filed and copy hand-given to Mr. Mello;

December 23

Letter from Atty. Piper filed with attached Exhibits 1 & 2 to the Memo of Law in Support of Preliminary Inj. Mo., which were inadvertently left off from the Memo;

(Dec. & Injunctive
Relief – Power Project)

1985
December 24

Copies of letters from Reporter Reisner to Attys. Parker, French, Burak, Monte, Mello, Piper, Scobbo/Sikora and Marks/Yessne filed advising the cost for a copy of the transcript of the motions hearing held 12/20/85 is $30.00;

December 26

Dept. of Public Service Reply to Defts. Ludlow, Lyndonville, Morrisville & Washington Electric Cooperative's First Production Request filed by Attys. Marks and Yessne;

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COMPLEX ACTION – JUDGE MORSE ASSIGNED
S-412-85 Wnc *RULE 5(d)*

VT. DEPARTMENT OF
PUBLIC SERVICE

vs

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO., ET AL

(Dec. and Inj. Relief –
Power Project)

(SEE COVER PAGE FOR LIST OF APPEARANCES)

1986
January 17

Mo. to Extend Time to Respond to Mo. for Summary Judgment filed by Atty. Burak;

Letter filed by Atty. Yessne in response to Atty. Howe's letter of 1/14/86;

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1986

January 21

Copy of Subpoena, with Return of Service thereon, and attached Exhibit A, for Gerald R. Tarrant filed by Atty. Howe

January 22

Memorandum of Law, Mo. to Quash Subpoena & Reschedule Deposition & Certification filed by Atty. Marks;

January 23

Deft. Massachusetts Municipal Wholesale Electric Co.'s Mo. to Reschedule the Hearing of the Pltf's Mo. for Summary Judgment to a Time After the Court's Decision of the Pending Motions to Dismiss filed by Attys. Parker & Ferriter;

Memorandum in Opposition to Mo. to Quash Subpoena filed by Atty. Howe;

Reply of Village of Stowe to Village of Morrisville's Counterclaim for Declaratory Relief, Specific Performance, Injunctive Relief and Damages filed by Atty. French;

January 27

Response to Motion of MMWEC to Reschedule Summary Judgment Motion filed by Atty. Burak;

January 29

Letter filed by Atty. Parker re: Mo. to Quash the Subpoena;

The Villages' and WEC's Memorandum of Law in Opposition to Pltf's Mo. for Summary Judgment filed by Attys. Howe, Walke & Kehoe;

Deft MMWEC'S Memo of Law in Opposition to Plaintiff's Motion for Summary Judgment and Affidavit of Walter Gaebler, II Asst. Treasurer of

(Dec. & Injunctive
Relief – Power Project)

1986
January 29

MMWEC, in Opposition to Plaintiff's Motion for Summary Judgment filed by Atty. Gaebler;

Hearing on certain pending motions;
Morse, Jensen, Woodward, Js; Hartshorn, R.;
Motion to Dismiss Counts X-XIV-under advisement;
MMWEC's Motion to Dismiss dtd 12/16/85 – under advisement;
DPS Mo. to Quash Subpoena and Reschedule Deposition-withdrawn
Motions continue to be heard on 2/18/86 at 9:30 A.M.;
Judge Morse ordered from the bench counsel are to proceed according to Rule 5(d) as it pertains to discovery;

COMPLEX ACTION – JUDGE MORSE ASSIGNED
COUNTERCLAIM

S-412-85 Wnc *RULE 5(d)*
VT. DEPARTMENT OF
PUBLIC SERVICE

vs Vol 114 P 66

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO., ET AL

(Dec. and Inj. Relief –
Power Project)

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1986
February 20

Letter filed by Atty. Kehoe requesting a transcript of hearing held 2/18/86; Copy of letter hand-given to Reporter Chamberlain;

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Relief – Power Project)

1986

February 20

Affidavit of Donald R. Ellison filed by Atty. Howe;

February 21

Check rec'd from Atty. Parker in amount of $39.50 in payment of a copy of the transcript of hearing held 1/29/86 and hand-given to Reporter Hartshorn; Said copy of transcript mailed to Atty. Parker;

February 24

Check in the amount of $39.50 rec'd from the State of VT in payment of a copy of the transcript of the hearing held 1/29/86 and hand-given to Reporter Hartshorn; Copy of Transcript hand-given to Brenda Pepin of Atty. Marks' office;

March 5

Notice of Appearance on behalf of Deft., Village of North-field filed by Atty. Howe;

Mo. for Extension of Time With Respect to Respond to the Filings of Pltf., VEC and Stowe in Connection with Pltf's Mo. for Summary Judgment and for Hearing, Memorandum in Support of Motion with attachments, Affidavit of William J. Gallagher and Affidavit of William H. Dunn, Jr. filed by Attys. Walke, Howe and Sikora;

March 6

Opposition to LLMNW's Request for Extension of Time to Respond to Pltf's Summary Judgment Filings & Request for Order filed by Attys. Mark and Yessne;

March 7

Affidavit of William H. Dunn, Jr., Manager of MMWEC's Power Management Div., in Support of MMWEC's Memorandum of Law filed by Atty. Howe;

(Dec. & Injunctive
Relief – Power Project)

1986
March 10

Mo. for Summary Judgment, Mo. to Amend Complaint, Application for Modification of Preliminary Injunction Order, Village of Stowe's Supplemental Memorandum of Law and Affidavit of Joyce Slayton filed by Atty. French;

March 11

Objection to Application for Modification of Preliminary Injunction filed by Atty. Mello;

March 14

DPS Mo. for Order Compelling Discovery Responses from the MA. Municipal Wholesale Electric Co. filed by Attys. Marks & Yessne;

Village of Stowe's Memorandum in Response to the Village's Mo. for Extension of Time filed by Atty. French;

JUDGE MEAKER

COMPLEX ACTION – ASSIGNED *COUNTERCLAIM*

Vol 114 P 66 S-412-85 Wnc *RULE 5(d)*

VT. DEPARTMENT OF
PUBLIC SERVICE

vs

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO., ET AL

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Power Project)

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1986
April 23
Mo. to Enlarge filed by Atty. Singal (FSSC&R);

Mo. to Compel & Memorandum of Law filed by Attys. Howe & Kehoe;

Opposition to Pltf's Mo. for Order Compelling Discovery filed by Atty. Howe;

April 24
Letter filed by Atty. Marks re: discovery;

April 28
Letter filed by Atty. Howe re: discovery;

May 1
Answer of the Massachusetts Municipal Wholesale Electric Company filed by Attys. Caruso and Sikora;

Hearing on pending motions; Morse, Jensen & Woodward, Judges Liz Trotter, Reporter; Pre-filed testimony of experts to be filed by 5/30/86; Status conference scheduled on 6/13/86 at 1:00 P.M.;

May 16
Memorandum in Opposition to Mo. of LLMW to Compel Discovery filed by Attys. Marks and Yessne;

May 22
Reply Memorandum of Vt. Electric Cooperative Inc. in Support of Summary Judgment and the Affidavit of Michael L. Burak filed by Atty. Burak;

June 2
Letter to Judge Morse from Atty. Yessne filed re: discovery;

Prefiled Direct Testimony of William J. Gallagher on Behalf of Defts Villages and WEC filed by Atty. Howe;

(Dec. & Injunctive
Relief – Power Project)

1986
June 2

Defendants' Joint Pre-Trial Brief signed by Atty. Howe, Atty. Mahoney, and Atty. Reginald Howe filed;

Testimony of Eugene W. Devlin on Behalf of Massachusetts Municipal Wholesale Electric Co.; Testimony of Guy W. Nichols on Behalf of Massachusetts Municipal Wholesale Electric Co. and Defts' Proposed Stipulation of Facts filed; (all documents filed on 6/2/86 mailed to Judge Morse)

June 12

Proposed Stipulation of Facts, Second Amended Complaint Against All Defts, Mo. to Amend Complaint & Memorandum of Law in Support of Motion filed by Attys. Marks & Yessne;

June 13

Status conference held; Morse, Jensen & Woodward, Judges; Hartshorn, Reporter;

Counsel working on Stipulation of Facts;

JUDGE MEAKER

COMPLEX ACTION – ASSIGNED *COUNTERCLAIM RULE 5(d)*

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VT DEPARTMENT OF
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v.

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO., ET AL

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1986

August 7

Letter from Michael Marks, Dir. for Public Advocacy filed confirming his oral request for a copy of the expedited transcripts of the hearings held 7/30, 7/31 and 8/1/86; Copy mailed to Reporter Hartshorn; Check in the amount of $22.50 rec'd from Atty. Howe in payment of outstanding amount due for pages 26-30 of first partial transcript done; Check in the amount of $15.75 rec'd from Atty. Howe in payment of the additional pages of Mr. Gillette's testimony; and check in the amount of $645.00 rec'd from Atty. Howe in payment of the 1/2 estimated cost for a transcript of the three days of hearing held 7/30, 7/31 and 8/1/86; All three checks mailed to Reporter Hartshorn;

August 8

Hearing held on Pre-filed testimony re Gallagher; Meaker, Jensen, Woodward, Judges; Reisner, Reporter; No presently pending motions shall be set for hearing without a request for same by the moving party;

Stipulation and Procedural Order filed and copies hand-given to counsel;

Volumes 1 and 2, Exhibits to Defendants' Proposed Stipulation of Facts, filed by counsel;

August 12

Motion to Consolidate with S-301-86, MMWEC v. State of VT, et al, filed by Atty. Parker;

Phone call per Atty. Yessne that 8 items marked with an X on Stipulation Exhibit are *not* to be considered by Judge Meaker;

August 14

Transcript of Partial Testimony of Clayton Gillette filed by Reporter Hartshorn; $16.00 due from Atty.

(Dec. & Injunctive
Relief – Power Project)

1986
August 14
Marks; Transcript mailed to Atty. Marks per Reporter Hartshorn (mailed 8/19/86);

September 2
Letter from Atty. Marks filed re copies of the expedited transcripts of the hearings held 7/30, 7/31 and 8/1/86; Copy of letter hand-given to Reporter Hartshorn;

September 3
Reporter Hartshorn phoned Atty. Marks re transcript of hearings held 7/30, 7/31 and 8/1/86; Atty. Marks advised there was a mix-up in his office and he *does have* the transcript;

September 15
Letter filed by Atty. Yessne re: transcript of hearing held 5/1/86; Copy of letter mailed to Reporter Trotter;

September 19
Stipulation of Facts filed by counsel;

JUDGE MEAKER

COMPLEX ACTION – ASSIGNED SUPREME COURT 386-555 *COUNTERCLAIM RULE 5(d)*

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VERMONT DEPARTMENT
OF PUBLIC SERVICE

v.

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO., ET AL

(Declaratory and Injunctive
Relief – Power Project)

1986
October 6

Check rec'd from the State of Vermont to Reporter Trotter in the amount of $49.50 in payment for the transcript of the hearing held 5/1/86 and mailed to Reporter Trotter (said transcript had already been released);

Reporter Hartshorn advised she had also rec'd her check from the State of Vermont in payment of the transcript of hearings held 7/30/86, 7/31/86 and 8/1/86 (copies of the transcripts-said copies had been previously released);

Letter filed by Atty. Howe re proposed "Order Realigning Parties";

October 8

Hearing on all Motions and Cross Motions for Summary Judgment Meaker, Judge; Joan Giard, Reporter; Under advisement;

October 10

Proposal of the Villages and WEC for Additional Orders filed by Atty. Howe;

November 26

Judgment with Appendix filed; Copies mailed to counsel;

December 2

Notice of Appeal dated December 2, 1986 filed by Attorney Yessne; Copies of Notice of Appeal mailed to Judge Meaker, counsel and the VT Supreme Court 12/3/86;

Letter filed by Atty. Marks requesting a transcript of the hearing held 10/8/86;

December 3

Transcript Order Notification and copy of Atty.

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Relief – Power Project)

1986

December 3

Marks' letter mailed to Reporter Giard (Reporter Giard has her notes of the hearing held 10/8/86);

December 5

Notice of Appeal dated December 4, 1986 filed by Attorney Burak; Copies of Notice of Appeal mailed to Judge Meaker, the VT Supreme Court and counsel 12/8/86;

December 24

Notice of Appeal dated December 22, 1986 filed by Attorney French; Copies of Notice of Appeal mailed to Judge Meaker, the VT Supreme Court and counsel 12/29/86; $35.00 check returned to Atty. Stackpole 12/29/86;

1987

January 23

Certified copy of Docket Entries mailed to the VT Supreme Court per Atty. Yessne's request;

February 20

Copy of letter to Jane Fitzpatrick, Clerk, Vt. Supreme Court from Atty. Anderson filed re: docketing statement;

EXHIBIT B

STATE OF VERMONT
WASHINGTON COUNTY, ss.

VERMONT DEPARTMENT OF PUBLIC SERVICE, Plaintiff, vs. MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC CO.; VILLAGE OF LUDLOW; VILLAGE OF LYNDONVILLE; VILLAGE OF MORRISVILLE; VILLAGE OF NORTHFIELD; VERMONT ELECTRIC COOPERATIVE, INC.; WASHINGTON ELECTRIC COOPERATIVE, INC., Defendants.	Washington Superior Court Docket No. S-412-85 Wnc

MOTION TO INTERVENE

NOW COMES the Village of Stowe, by and through its attorney, Edward B. French, Jr., and moves the Court for permission to intervene as a party plaintiff in the above-entitled action.

MEMORANDUM OF LAW

A. *FACTUAL BACKGROUND.*

This is an action brought by the Vermont Department of Public Service to invalidate the Project Six Power Sales

Agreements entered into between Massachusetts Municipal Wholesale Electric Company ("MMWEC") and various Vermont utilities, including the Village of Morrisville. The Village of Stowe did not enter into a Power Sales Agreement directly with MMWEC, but, pursuant to a Power Sales Contract with the Village of Morrisville dated May, 1981, it agreed to purchase 2.77 megawatts of Morrisville's entitlement in Project Six. The Power Sales Contract explicitly provided that Stowe would fully perform each and every "undertaking" set out in the previously executed Power Sales Agreement between Morrisville and MMWEC. It is the Village of Stowe's position that the Power Sales Agreement and the Power Sales Contract are void and unenforceable.

B. *LEGAL BASIS FOR INTERVENTION.*

(1) *Intervention as a Matter of Right.*

VRCP 24(a) provides that:

> Upon timely application anyone shall be permitted to intervene in an action.. . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Stowe has a clear and undeniable right to intervene in this action under the provisions of VRCP 24(a). It has an interest relating to the Power Sales Agreement, since it may be liable to pay a share of Seabrook costs under its contract with Morrisville if the MMWEC agreements are held to be valid. It is situated such that disposition of this

action may impede its ability to protect its interest. A holding affirming the validity of the Power Sales Agreement would impose liability upon Stowe, because the Agreement terms are incorporated into Stowe's Contract with Morrisville. Stowe's position is not adequately represented by other parties to this action. Morrisville has an obvious interest in upholding the validity of its Contract with Stowe, and the Department of Public Service represents the public good, which may not be identical with the Village of Stowe's private interest.

This case falls directly within the rules of interpretation discussed in *In Re Vermont Public Power Supply Authority*, 140 Vt. 424 (1982). In that case, municipal rate payers were allowed to intervene in a Public Service Board proceeding dealing with the validity of an obligation entered into by VPPSA. As in this case, the ratepayers' interest arose from their obligation to pay a share of the loan obligation in the event its validity was upheld. Id. at 431. Their ability to protect their interest would have been impeded if they were not allowed to intervene in a Public Service Board proceeding dealing with the validity of the obligation. Id. at 432. The Vermont Supreme Court in that case specifically distinguished between the interest of the State (already a party to the action), as representative of the public good, and the potentially differing private interests pursued by the ratepayers. Id. at 433.

(2) *Permissive Intervention.*

Even if the Village of Stowe could not intervene as a matter of right, it has adequately satisfied that grounds

for permissive intervention set out in VRCP 24(b). Its claim and the main claim in this case have identical questions of both fact and law, since the terms of the MMWEC Agreement are at the very heart of the contract between Stowe and Morrisville. There will be no undue delay of the proceedings, since this action is less than a week old. There are no grounds that concluding that Stowe's involvement in this suit will prejudice the rights of other parties.

(3) *Procedural Prerequisite to Intervene.*

One prerequisite to intervention is the filing of a pleading which sets forth the claim for which intervention is sought. The Village of Stowe has included its proposed Complaint with this Motion.

C. *CONCLUSION.*

The Village of Stowe has a right to intervene under VRCP 24(a), and has furthermore satisfied the grounds for permissive intervention under VRCP 24(b). It asks this Court to include it as a party plaintiff in this case.

Dated at Stowe, Vermont, this 24th day of October, 1985.

/s/ Edward B. French Jr.
Edward B. French, Jr.
Attorney for Village of Stowe